## INDEX


| | Page |
|---|---|
| I. As to the State Law Issues | 2 |
| A. State Court Case Now Set for Trial on March 4, 1963 | 2 |
| B. Conflict Between Beezer and Court of Appeals Requires Review | 3 |
| C. Total Inapplicability of Cases Cited by Respondents | 4 |
| D. No Dual Standard | 8 |
| E. State's Sovereign Control of Its Municipalities | 9 |
| II. As to the Conflict of Interest Issues | 9 |
| A. Fundamental Issues as to Conflict of Interest Laws | 9 |
| B. The Government's Misleading Account of the Conflict of Interest Issues | 11 |
| Conclusion | 15 |


## CASES CITED


Beezer v. City of Seattle, 160 Wash. Dec. 241, 373 F. 2d 796; 160 Wash. Dec. 652, 375 P. 2d 256 ..... 2, 3, 4
Burton v. United States, 202 U.S. 344 ..... 12, 15
City of Tacoma v. Taxpayers, 357 U.S. 320, reversing 49 Wash. 2d 781, 307 P. 2d 567 (1957) ..... 5
First Iowa Coop. v. Power Comm'n, 328 U.S. 152 ..... 6, 7
Kohl v. United States, 91 U.S. 367 ..... 5
State of Washington Dept. of Game v. Federal Power Comm'n, 207 F. 2d 391, certiorari denied, 347 U.S. 936 ..... 6, 7
United States v. Carmack, 329 U.S. 230 ..... 6
United States v. Mississippi Valley Co., 364 U.S. 520 .. 12
United States v. Tuscarora Indian Nation, 362 U.S. 99 8


## OTHER AUTHORITIES


Federal Power Act, 16 U.S.C. §§ 791a-823:

Section 9(b), 16 U.S.C. § 802(b) ..... 6
Section 21, 16 U.S.C. § 814 ..... 5, 8, 9

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

---

No. 611

---

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Petitioner*

v.

FEDERAL POWER COMMISSION, and CITY OF SEATTLE

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## PETITIONER'S REPLY

---

The responses underscore the importance of this Court's granting certiorari to review both the state law issues and the conflict of interest issues. These are issues which this Court never has passed upon. In no previous case has this Court decided whether the Federal Power Commission, by granting a license,

may confer on a city the power to condemn another municipality's electric properties when the state legislature, in regulating the relationship between its own municipalities, has expressly prohibited the city from resorting to such use of eminent domain. Nor did this Court ever before have occasion to determine whether a litigant's serious violations of the federal conflict of interest laws shall be condoned merely because corruption, venality or influence-peddling has not been affirmatively proved.

Nothing in the responses filed by the Government and by Seattle can obscure the fact that these are issues with an impact extending far beyond this particular case. Both responses, moreover, are notable for their failure to address themselves squarely to the real questions presented.

## I. AS TO THE STATE LAW ISSUES

### A. State Court Case Now Set for Trial on March 4, 1963

Pursuant to the Washington Supreme Court's remittitur in *Beezer* v. *City of Seattle* (Petition, Appendixes C and D), the interpretation of state law as applied to petitioner's properties in this case is now set for trial in the state trial court on March 4, 1963—despite Seattle's efforts at delay. That trial is to determine whether, within the Washington statute's meaning, petitioner's properties are electric properties and hence are properties which the State expressly has prohibited Seattle from condemning. The state courts are the appropriate forum for adjudicating such issues. Indeed, they constitute the only forum where an authoritative adjudication can be obtained.

**B. Conflict Between Beezer and Court of Appeals Requires Review**

FPC expressly abstained from making any determination of these state law issues (S.J.A. 316; see Petition, p. 8). But the Court of Appeals nevertheless went ahead to inject a view of its own that petitioner's properties are not a part of petitioner's electric system and therefore do not come within the prohibitory Washington statute (Petition, p. B-9). This it accomplished—as our Petition (pp. 10, 24) has shown—by totally disregarding the *Beezer* decision in which the Washington Supreme Court had just ruled that these precise issues must proceed to trial in the state court. A direct conflict results between the Court of Appeals and the *Beezer* decision, requiring review by this Court.

The Government (Br. Opp., p. 16), characterizing the Court of Appeals comments on the state law issues as "merely an alternative ground of decision", now says that "whatever differences may exist" on these state law issues between the views of the Washington Supreme Court in *Beezer* and the views of the Court of Appeals in this case "do not justify review by this Court". But the direct conflict of these decisions makes such review imperative.

The problem is a fundamental one of distribution of functions as between the federal and the state courts, and indeed of usurpation of power by the Court of Appeals. The Court of Appeals refused to await the state court determination; and it dealt erroneously with the merits of state law issues which FPC expressly left open and which the state court is on the verge of adjudicating. This the Court of Appeals did in plain

conflict with the Washington Supreme Court's opinion and action in *Beezer*.[1]

The Government (Br. Opp., p. 22) and Seattle (Br. Opp., p. 13) both stress the desirability of bringing to a close the litigation in which these competing proposals for projects have become enmeshed. It is at least equally important that the fundamental questions presented by the litigation be resolved correctly. And in any event, if certiorari were denied and the Court of Appeals opinion remained without the benefit of a review on the merits by this Court, the ultimate effect might well be to lengthen rather than to shorten the litigation.

### C. Total Inapplicability of Cases Cited by Respondents

The Government's main argument (Br. Opp., pp. 11-15) on the state law issues is that the Court of Appeals was correct in holding that the State of Washington cannot effectively prohibit its own municipality (Seattle) from condemning petitioner's electric prop-

[1] The Government also records in a footnote (Br. Opp., p. 16, note 6) its belief ("we believe") that state law, if applicable, "would not have prevented Seattle's exercise of eminent domain" because the statutory provision relied on by petitioner "is merely a *limitation* on a grant of eminent domain power made by the State" and "does not even purport to forbid the exercise of power received from any other source." Even if the Government's suggested interpretation of the Washington statute were less highly implausible than it actually is, it would at best be a reflection of the Government's current speculations on the subject of Washington law. It would in no way be an adequate substitute for the authoritative judicial determination which the Washington Supreme Court has directed to be made by trial of the issues in the state court. Moreover, if the Washington Supreme Court had agreed with the Government's far-fetched suggestion as to the Washington statute's meaning, then there would have been no occasion for the Washington Supreme Court to take the action it did take in remanding the *Beezer* case for trial.

erties. The Government claims that, despite the prohibitory Washington statute, Section 21 of the Federal Power Act gives Seattle power to override the State statute regardless of what the statute provides, "simply because it is a federal licensee". Seattle makes a similar claim. Our Petition (pp. 16-22) has shown that this ruling of the Court of Appeals is in conflict with holdings of the Washington Supreme Court, that it misinterprets this Court's *Tacoma* decision, and that it raises grave constitutional questions as to the power of the States to restrict the activities of their own municipal subdivisions.

The cases cited by the Government (and those cited by Seattle as well) in no way contradict this analysis. Moreover, they make it clear that the important issues raised in this proceeding have never been passed upon by this Court, and that both the Government and Seattle are seriously confused concerning the issues actually presented here.

The Government's strong reliance (Br. Opp., p. 13) on *Kohl* v. *United States*, 91 U.S. 367, 374, and decisions stemming from it, is wholly wide of the mark. For *Kohl* involved a condemnation proceeding brought by the Federal Government itself to condemn land located within a State and intended for use as a United States post office. But Seattle is not the United States; nor would Seattle here condemn property for the use of the United States. Seattle is a city of the State of Washington, prohibited by its creator from condemning electric properties of Washington public utility districts. *Kohl* has nothing at all in common with the problem presented by this case—namely, whether a State is, or constitutionally may be, ousted by the Federal Power Act or by the Federal Power Com-

mission from the State's normal jurisdiction to enforce its sovereign control over its own municipalities. The same is true of the Government's reference (Br. Opp., p. 13) to *United States* v. *Carmack*, 329 U.S. 230—another instance where the United States was condemning a post office site for its own use and where the Court's statement that state laws cannot restrict that right has no possible application to the issues in this case.

The *First Iowa* and the *State of Washington Department of Game* decisions, as our Petition (pp. 21-22) has shown, involved state "veto" laws bearing no resemblance to the Washington statute present here; thus the respondents' heavy reliance (Government Br. Opp., pp. 13-15, and Seattle Br. Opp., pp. 13-17, 24) on these decisions is totally misplaced.

*First Iowa* involved a state law which forbade the construction of a dam in a navigable stream without a permit from a State executive council; quite naturally, this Court (328 U.S. at 164) held the state law to be a "veto" law which was superseded by the Federal Power Act. In the present case, however, the Washington statute makes no reference to a dam or a navigable river. It simply prohibits a city (here Seattle) from condemning the electric properties of a public utility district—properties which in this case petitioner acquired before Seattle applied for a license. The Government (Br. Opp., p. 14) quotes from *First Iowa*, 328 U.S. at 177, to the effect that Section 9(b) of the Federal Power Act "does not itself require compliance with any state laws". But the Government neglects to refer to what this Court said later in the same paragraph, namely (328 U.S. at 178): "The need for compliance with applicable state laws, if any, arises

not from this federal statute but from the effectiveness of the state statutes themselves." And as our Petition (pp. 20-21) demonstrates, there is virtually no state law which could have a greater "effectiveness" than a statute by which the State fixes and controls the powers and relationships of its own municipal corporations, one against the other.

Similarly, in connection with the *State of Washington Department of Game* case the Government's quotation (Br. Opp., p. 13) is entirely misleading, because it omits the part of the Ninth Circuit's opinion which might have some bearing here. Immediately following what the Government quotes, namely, "state laws cannot prevent the Federal Power Commission from issuing a license or bar the licensee from acting under the license to build a dam on a navigable stream", the Ninth Circuit's opinion continues (207 F. 2d at 396):

> "However, we do not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted. There may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them."

In marked contrast to the three state laws[2] which the Ninth Circuit expressly passed upon in the *State of*

---

[2] These were, respectively, (1) a requirement that, in connection with the construction of a dam in a navigable stream; a permit for the diversion of water be obtained from the State Supervisor of Hydraulics; (2) a similar requirement that written approval as to plans and specifications be obtained from the State Director of Fish and Game; and (3) a requirement that dams in the Cowlitz River be limited to the 25-foot maximum height which the State legislature had established. All three of these requirements were clearly in the nature of "veto" laws, within the meaning of this Court's *First Iowa* decision.

*Washington Department of Game* case, here the Washington statute is not a "veto" law whereby the State has sought to block a federally-licensed project on the Pend Oreille river. The Washington statute does not refer to navigable streams, nor does it establish limitations on the licensing of dams on navigable streams. Rather, the Washington statute is an express prohibition which the State has imposed upon Seattle's charter, depriving Seattle and other cities of the legal capacity to condemn electric properties of public utility districts.

On this phase of the case the respondents' final irrelevance is their reliance on *United States* v. *Tuscarora Indian Nation;* 362 U.S. 99. The *Tuscarora* decision did not involve any question whatsoever of a prohibitory state law. *Tuscarora* is notable, moreover, for the great care with which this Court considered whether there was any federal law or policy which stood in the way of a licensee's using Section 21 of the Federal Power Act to take property of the tribe by eminent domain.

**D. No Dual Standard**

The Government complains (Br. Opp., pp. 12-13) that petitioner's contention would result in "a kind of dual standard, with one power under Section 21 for private corporations and another for municipal corporations". This again shows confusion as to the issue.

Petitioner does not contend for a dual standard under Section 21. Rather, petitioner's position is that to the extent that the state statute has fixed and limited Seattle's use of eminent domain against petitioner's electric properties, nothing the FPC can do can repeal or override that limitation. The root of the trouble is

that in this case FPC has chosen Seattle as a licensee wholly without regard to whether, under the State's prohibition on its charter, Seattle could carry out the terms of its license.

### E. State's Sovereign Control of Its Municipalities

As our Petition (p. 20) has shown, the whole thrust of American constitutional development confirms a State's authority to control and limit activities of its own municipalities. Under the Constitution and the Federal Power Act, if properly interpreted and applied, the State of Washington is entitled to full recognition of the express statutory prohibition which it has deliberately imposed on Seattle's authority. If the State of Washington chooses to prohibit its own municipality Seattle from taking eminent domain actions which would be necessary before Seattle could carry out this proposed hydroelectric project in a distant sector of the State, the State's policy must prevail. This Court has never given the slightest intimation that Section 21 of the Federal Power Act should be interpreted to override a state statute of this type.

## II. AS TO THE CONFLICT OF INTEREST ISSUES

### A. Fundamental Issues as to Conflict of Interest Laws

The Government's response highlights the urgent need for this Court to make a full review of the conflict of interest issues. For one thing, the Government has now given the weight of its endorsement to the unsupportable Court of Appeals decision that, as applied to evidence and witnesses in a federal administrative proceeding, the prohibitions of the conflict of interest laws may be disregarded unless corruption, venality or influence-peddling is affirmatively proved. For another thing, the Government's response shows how much

this case revolves around the fundamental question whether the conflict of interest laws should be applied in a proceeding involving other litigants just as vigorously and as firmly as the conflict of interest laws would be applied in a proceeding to which the United States is a formal party.

The Government now at least acknowledges (Br. Opp., p. 17) that the practice of regular federal employees of the Bureau of Reclamation hiring themselves out to render services to a contestant in a proceeding in which the Government has an interest "was, in our view, a practice subject to abuse". But the Government apparently takes the position that nobody except the Government itself has a right to complain about having been the victim of such abuse.

This is far too narrow a view of the federal conflict of interest statutes and policies. That the Government has an obligation to enforce those statutes and policies so as to safeguard the interests of the United States is uncontestable. But regardless of whether the Government meets this obligation or neglects to do so, those statutes and policies stand equally as a bulwark of protection for the rights of others. This is a basic issue, both novel and important, which the present case raises.

A litigant in a contested federal proceeding who discovers that his opponent has pursued the precise course of conduct which the conflict of interest laws forbid certainly cannot be left without a remedy merely because the Government, through somnolence or otherwise, has failed to assert the obvious objections. The Court of Appeals decision to the contrary is a precedent unusual for its laxity and capable of enormous harm to the public interest.

### B. The Government's Misleading Account of the Conflict of Interest Issues

The Government's description of the conflict of interest aspects of the case is highly misleading in material respects. This misleading account the Government has used as its basis for drawing conclusions at least equally erroneous. For example:

1. The Government says (Br. Opp., p. 10) that it was "after the hearings—long after the government engineers [hired by Seattle] had finished their technical work" that "the Bureau of Mines and the United States Geological Survey took a position opposing any project on this stretch of the Pend Oreille". But as the record shows (J.A. 144) and as our Petition (pp. 11-12) points out, the Interior Department had opposed Seattle's proposed Boundary project and had so notified FPC at least as early as July 1, 1954—more than four years before the hearings in this case opened and more than a year before Seattle hired Winter and the other full-time Bureau of Reclamation employees to do this work. Thus when Seattle embarked on its unlawful course of conduct by hiring Winter and the other Interior Department employees to work for Seattle in connection with Seattle's preparations for this FPC proceeding, the hostile attitude of the Interior Department toward Seattle's project was already well known and a matter of public record.

2. In these actual circumstances—instead of the somewhat fictitious circumstances suggested by the Government—there might be abundant temptation to such an applicant to hire reputable and well-known Interior Department employees in the hope of softening or diluting or even overcoming Interior Department resistance. Whether in fact such factors were a

motivating force in this particular case has been made irrelevant by the broad statutory policy which Congress expressed in the conflict of interest laws. As our Petition (pp. 27-30) shows, Congress outlawed a whole class of conduct so that such *ad hoc* factual inquiries—which at best may be difficult to pursue and uncertain to resolve—would not have to be made on a case-by-case basis.

3. The Government claims (Br. Opp., p. 19) that "the record demonstrates that neither the engineers nor Seattle was guilty of influence-peddling or any other corrupt or venal activities, and that the Commission's determination would not be influenced by the activities in which the employees had engaged." As we have shown, the conflict-of-interest laws prohibit Seattle's course of conduct regardless of whether any such specific occurrence is affirmatively proved. The Government's effort to excuse the conflict of interest violations on such grounds is comparable to the Court of Appeals' minimizing them as merely a "technical violation". Previous to the Court of Appeals decision here, no court has ever indulged in such lax interpretation of the conflict of interest laws. In *Burton* and in *Dixon-Yates*, as the Petition (pp. 25-29) sets forth, this Court applied and enforced standards which are far more rigorous. These standards should be applied and enforced with equal vigor when a litigant, in a contested proceeding in which the Government has substantial direct interests, has hired Government employees to prepare and to testify in support of the litigant's case.

4. What the Government asserts is seriously misleading for other reasons as well. The record in no way "demonstrates" the absence of influence-peddling

or corrupt or venal activities; it merely does not demonstrate whether any such activities occurred or not. On these phases of the case, moreover, the record is incomplete, and through no fault of petitioner's. Petitioner's efforts to subpoena two high officials of the Interior Department, in order to obtain for the record all the pertinent facts relating to the conflict of interest violations (including facts as to *ex parte* representations made by Seattle to the Interior Department) were rebuffed, and petitioner's applications for the subpoenas were denied (Petition, pp. 5, 15). And again contrary to the Government's suggestion, no one now will ever be able to tell the extent to which FPC, whether consciously or unconsciously, may have been "influenced by the activities in which the employees had engaged".

5. The Government is completely in error in stating (Br. Opp., p. 20) that "Winter's testimony concerned only technical power aspects of the project, which were not the subject of substantial conflict between Seattle and PUD [petitioner]". First, the record shows that even the "technical power aspects" covered by Winter's testimony were the source of substantial conflict between Seattle and petitioner.[3] Second, and perhaps

[3] For example, Winter testified on the comparative merits of Seattle's and petitioner's proposed projects (Tr. 1120-1121); he was cross examined extensively on this (Tr. 1135-1141); and petitioner introduced considerable expert testimony in rebuttal of what Winter had said (Tr. 2508-2613). Indeed, Winter testified on direct examination that his responsibilities included "the development of the potentialities of this reach of the Pend Oreille river, considering the costs and the engineering feasibility of the sites which might be selected" (J.A. 54); and Winter admitted on cross examination (J.A. 73) that his services for Seattle included work on the "comparative project and energy costs" in issue in the hearing.

even more critical, is the fact that, over petitioner's strenuous objections, Winter as Seattle's witness was permitted to testify to the ultimate finding which FPC is required to make under the Federal Power Act and to express his opinion that Seattle's Boundary project, as a power site, is the best site for developing the full potentiality of this stretch of the Pend Oreille river (Tr. 869 and J.A. 57-58; see Petition, p. 14). Particularly in view of the examiner's finding that Winter's qualifications were "most impressive" and the examiner's extensive reliance on the work Seattle had paid Winter and the other Bureau of Reclamation employees to perform (Petition, p. 15), the prejudice to petitioner was severe.

6. The Government (Br. Opp., pp. 9, 20), somewhat like Seattle (Br. Opp., pp. 21-22), intimates that the final Seattle plan as approved by FPC was so different from the original Seattle proposal that it involved a "rejection" of "Winter's chief contribution". But the record shows that the final Seattle design was simply the Winter power plant shifted to an underground location (J.A. 118; Tr. 4322-4344). Seattle's "composite plan", as finally approved by FPC, consists of this Winter power plant moved underground, plus the thin-arch dam which was part of Seattle's original plan and which was designed for Seattle by the other regular Bureau of Reclamation employees whom Seattle hired. Indeed, when Seattle's initial estimates showed that Seattle's project would be a less economic development than petitioner's project, Seattle was permitted over petitioner's objection (Tr. 4014-4017, 4330) to introduce these amendments to its plan, accompanied by lower cost estimates, to support Winter's testimony that Seattle's project and not

petitioner's would afford the best development of this stretch of the river. Accordingly, nothing in the record justifies a suggestion that the case can be considered as if the grounds of FPC's decision had been wholly separated and insulated from Seattle's tainted evidence reflecting the important work which Seattle hired Winter and the other regular Bureau of Reclamation employees to perform in violation of the conflict of interest laws and policy.

7. The Government says (Br. Opp., p. 19) that the Bureau of Reclamation engineers "were not retained . . . because they were employees of the government". This is something like saying that the defendant in *Burton* v. *United States*, 202 U.S. 344, was not retained because he was a United States Senator.

## CONCLUSION

For these reasons, as well as for the reasons set forth in the Petition, certiorari should be granted.

Respectfully submitted,

CLARENCE C. DILL
601 Hutton Building
Spokane, Washington

LLOYD W. EK
Ione, Washington

JOSEPH VOLPE, JR.
BENNETT BOSKEY
Volpe and Boskey
1701 K Street, N. W.
Washington 6, D. C.

*Attorneys for Public Utility District No. 1 of Pend Oreille County, Washington*

February 7, 1963